

# Written Testimony for raised SB1151:

TO: Judiciary Committee:

Testimony in favor of the proposed changes to Sec. 52-570d (Recording of telephonic communications.) of the **GENERAL STATUTES OF CONNECTICUT (Revised to January 1, 2011 edition)** (Author: Lawrence S. Jezouit) ([ljz@comcast.net](mailto:ljz@comcast.net)) or [amend52-570d@comcast.net](mailto:amend52-570d@comcast.net) Phone: (860) 953-3909)

**Note:** The author has cited several documents, e.g., state and federal legislative history, acts, FCC, CFR, etc., throughout this testimony to substantiate text. Most, if not all, have been computer scanned as a .pdf file and would be available to be forwarded via e-mail on request.

**Preface:** Each elected legislator – senator and representative alike – of the Connecticut General Assembly (CGA) should avail themselves of this opportunity to provide their constituents with a revised law in the form of a “housekeeping bill” that will rectify a set of **unintended detrimental consequences** inherent to the original law’s language, an increased measure of **fairness** vis-à-vis several other jurisdictions’ subject matter laws, a set of **efficient** procedures for recording telephonic communications **while at the same time preserving and protecting their right to privacy**, and harmonize §52-570d with §52-184a and §§53a-187(a)(1). That is to say no proposed change herein alters the intent or requirements of the existing statute where the every-other-party consent requirement remains in effect for recorded intrastate telephonic communications.

The following is example of an **unintended detrimental consequence** that has become increasingly egregious over twenty plus years that most likely affects almost every home, business, and government phone that answers and records calls via a feature commonly referred to as a “message answering system.” The existing language of §§52-570d(a)(1) and (2) requires that any verbal consent/notification must be part of the recorded call.

§§52-570d(a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication **and such prior consent** either is obtained in writing or **is part of, and obtained at the start of, the recording**, or (2) **is preceded by verbal notification which is recorded at the beginning and is part of the communication** by the recording party, or ... [Emphasis added.]

**Verification of the requirement to record any verbal consent or notification** under §§52-570d(a)(1) and (2):

(1) As set out in the General Statutes of CT in CHAPTER 1 CONSTRUCTION OF STATUTES:

Sec. 1-1. Words and phrases. (a) In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.

Sec. 1-2z. Plain meaning rule. The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

(2) As set out in *FRANK J. HOLLER v. BUCKLEY BROADCASTING CORPORATION ET AL.*, 47 Conn. App. 764, 770 (1998):

Section 52-570d creates a statutory cause of action that was not available at common law. Therefore, the language of the statute must be strictly construed. [Citations omitted.]

(3) Research and analysis of §§52-570d(a)(1) and (2)’s language:

(a) Compare the relevant parts of SB455 to sSB455 as amended – legislative history from CT State Library or CGA's Advanced Search: (Note that in the original raised SB455 there was no requirement to record the consent.)

STATE OF CONNECTICUT [Note: line numbers have been removed and text reformatted into paragraph form.]

Raised Rill No. 455

Page 1 of 2

Referred to Committee on JUDICIARY

LCO No. 2608

Introduced by (JUD)

General Assembly

February Session, A.D., 1990

#### AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

(NEW) (a) No person shall record a private telephonic communication by means of any instrument, device or equipment without the prior consent of all participants in such communication.

(Note that in the substitute as amended – passed as P.A. 90-305 and subsequently codified as §52-570d – the requirement is unambiguously specified consistent with §1-2z. Plain meaning rule and confirmed within the OLR's Bill Analysis section. Also, it will be shown below that for (a)(1) the CGA specifically and intentionally inserted the requirement, which in one source of the language the requirement was not included but reaffirmed as being necessary and then set out in another source – see 86FCC313, 322 ¶24. (1981) and 95FCC848, 850 (1983) and as obtained from PADRA, formerly DPUC, the applicable SNET General Exchange Tariff, (Effective 1987))

[Note: line numbers have been removed and text reformatted into paragraph form. The "strikethrough" portion below reflects hand made changes to the original archived document that was formalized under LCO 4114. Also CT State Library's copy showing hand made changes is available on request.]

File No. 523

Substitute Senate Bill No. 455

Senate, April 18, 1990. The Committee on Judiciary reported through SEN. AVALLONE, 11<sup>th</sup> DIST., Chairman of the Committee on the part of the Senate, that the substitute bill ought to pass.

#### AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

(NEW) (a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless-

~~(1) Such instrument, device or equipment can be physically connected to and disconnected from the telephone line or switched on and off; and (2) the use of such instrument, device or equipment (A) (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (B) (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (C) (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use. [Emphasis added.]~~

(Following is sSB455 – Amendment A, LCO 4114.)

STATE OF CONNECTICUT

AMENDMENT

LCO No. 4114

General Assembly

February Session, A.D., 1990

Offered by SEN. LARSON, 3rd DIST.

SEN. O'LEARY, 7th DIST.

SEN. MORTON, 23rd DIST.

SEN. MUSTONE, 13th DIST.

SEN. JOHNSTON, 29th DIST.

SEN. SULLIVAN, 5th DIST.

SEN. AVALLONE, 11th DIST.

To Subst. Senate Bill No. 455 File No. 523 Calendar No. 0329

Entitled "AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS."

In line 3, delete the colon

Delete lines 4 to 6, inclusive, in their entirety

In line 7, delete "(2) The" and insert in lieu thereof "the"

In line 8, delete "(A)" and insert in lieu thereof "(1)"

In line 12, delete "(B)" and insert in lieu thereof "(2)"

In line 14, delete "(C)" and insert in lieu thereof "(3)"

(Also see File No. 523 Substitute Senate Bill No. 455, page 4 under the OLR's Bill Analysis section that reads:

"Knowledge of all parties can be established in three ways: (1) by orally announcing to all parties to the conversation at the beginning that it is being recorded (**this announcement itself must be recorded**), ...)"  
[Emphasis added.]

(b) Compare §§52-570d(a)(1) and (2)'s language – original and **not** amended - to 47CFR64.501, various cited Federal Communications Commission (FCC) documents and SNET Tariff contemporary to passage of P.A. 90-305:

1. §§52-570d ... (a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication **and such prior consent** either is obtained in writing or **is part of, and obtained at the start of, the recording**, or (2) **is preceded by verbal notification which is recorded at the beginning and is part of the communication** by the recording party ... [Emphasis added.]

2. 47CFR64.501 (1989 edition) (Note that (a) does not specifically contain language that requires that a verbal consent be recorded but see 3. next.) § 64.501 Recording of telephone conversations with telephone companies. [Emphasis added.]

No telephone common carrier, subject in whole or in part to the Communications Act of 1934, as amended, may **use any recording device** in connection with any interstate or foreign telephone conversation between any member of the public, on the one hand, and any officer, agent or other person acting for or employed by any such telephone common carrier, on the other hand, except under the following conditions:

(a) **Where such use shall be preceded by verbal** or written consent of all parties to the telephone conversation, or

(b) **Where such use shall be preceded by verbal notification which is recorded at the beginning, and as part of the call**, by the recording party, or ...

3. Background: Briefly, the FCC over time has approved three methods to record telephonic communications as follows: (1) effective June 30, 1948 through present – **automatic tone warning device** (beep tone), (2) effective May 18, 1981 through present – an additional method allowing every recorded party's **written or verbal consent**, and (3) effective March 12, 1987 through present – an additional method allowing **verbal notification** that must be recorded at the beginning and as part of the recording. The citations next focus on methods (2) and (3) for the purpose of verifying that the requirement to record any verbal consent or notification. (Note that SNET Long Distance operates pursuant to FCC authority- see ¶25 below.)

86FCC 2d 313, 322-323 (1981) in part reads: (Note that in the language of Appendix C – subsequently 47CFR64.501 – does not include language to require the recording of a verbal consent. However, a Memorandum Opinion and Order was set out clarifying that the original and subsequent intent of the rule is that the verbal consent must be recorded.) [Emphasis added.]

24. As a result of this proceeding, Section 64.501 of our Rules, 47 C.F.R. §64.501, dealing with the use of recording devices by telephone companies, will be revised to comport with our findings. The revisions to Section 64.501 are set out in Appendix C and are to become effective on May 18, 1981.

25. In view of the foregoing and pursuant to the authority granted in Sections 2(a), 4(i), 4(j), 201, 205, 303(r) and 403 of the Communications Act, 47 U.S.C. §§152(a), 154(i), 154(j), 201, 205, 303(r) and 403, IT IS ORDERED, That all **common carriers** subject to Title II of the Communications Act, 47 U.S.C. 151 *et seq.* **shall revise such tariff regulations on file with this Commission which provide for the use of recording devices** in connection with interstate and foreign message toll telephone service and wide area telephone service, **to comport with this Order.**

**Appendix C 1. Part 64 - Miscellaneous Rules Relating to Common Carriers - Subpart E - Use of Recording Devices** by Telephone Companies- is amended as follows:

§64.501 is amended by revising paragraphs (a) and (b) and by adding a new (b)(1) to read as follows:

§64.501 Recording of telephone conversations with telephone companies.

**(a) Where such use shall be preceded by verbal or written consent of all parties to the telephone conversation, or, ...**

For the purpose of clarity and historical knowledge, 11FCC1033, 1044\* and 1045\* and 1047\* (1947), 12FCC1005, 1007 (1948) and 47CFR64.501(e), (1989 edition) are being included to demonstrate that the physical connection and the on/off language was set out from inception to the present. It can be verified that this language was included for the purpose of delineating FCC regulated recording procedures on the one hand and the recognition that states had jurisdiction over intrastate recording procedures. That being said one may reasonably conclude that the Senate's "last minute" Amendment A to sSB455, i.e., LCO 4114, provides clear evidence that the bill's language was not fully vetted or understood. And it is reasonable to conclude that in its existing form passage of sSB455 would likely carry with it unintended detrimental consequences. Time has verified such and raised ???? offers an opportunity to resolve detrimental consequences.

11FCC1044\*: The Bell companies also argue that the Commission should issue a report presenting the problem and announcing principles on which all regulatory authorities might agree, but that it should issue no order herein. The contentions advanced to support this argument are (1) the Commission has no jurisdiction to make an order regulating the use of recorders because such an order would regulate intrastate service, contrary to sections 2 (b) (1) and 221 (b) of the Communications Act, and (2) the use of recording devices is predominantly a problem for the States because telephone calls are so largely intrastate, and intrastate and interstate calls are commingled.

...

The National Association of Railroad and Utilities Commissioners has submitted suggestions, but it has taken no position on any of the matters in question here. Regarding the matter of the Commission's jurisdiction, the Association directed attention to the large proportion of intrastate **1045\*** and exchange telephone calls, and stated that the Commission should not enter any order in this case which would directly or indirectly impair complete freedom of action by the State Commissions to regulate telephone facilities while being used for intrastate toll and exchange service. The association further stated that the Commission should not enter any order herein which would permit anyone other than the telephone company **physically to connect any device** to existing telephone lines; or which would authorize the use of recording devices requiring **physical connection** to telephone lines, **unless the device is so arranged that the telephone user can make a complete physical disconnection** of the device while using the telephone facilities for intrastate toll or exchange purposes. ... [Emphasis added.]

**1047\*** The operating facts may well be considered first, since they also have a direct bearing on the factors mentioned by the National Association of Railroad and Utilities Commissioners. **In fact, a practical distinction can be made between the use of recording devices on interstate, as against intrastate, calls. It is proposed, and we conclude reasonably so, that it be required that recording devices be used only when such devices are so constructed that at the will of the users, they can be physically connected to and disconnected from the telephone line, or switched on and off.** In the case of the physically connected type of recorder, the connection can be effected by means of a plug-in jack arrangement <sup>11</sup> so that a disconnection can be made simply by pulling out the plug. The inductive type of recorder, which does not require a wire connection with the telephone line, must be switched on in some fashion to be used and hence can simply be switched off when its operation is not desired. Thus, **there is no reason why a recording device which can be used in connection with an interstate or foreign telephone call must be used in connection with an intrastate call; on the contrary, users can easily limit the employment of recording devices to their interstate and foreign calls.** Accordingly, State and other local regulatory authorities remain entirely free to deal as they see fit with the use of recording devices on intrastate calls. Whether, as the Bell System suggests, a user with a recording device will employ it on intrastate, as well as interstate and foreign calls, obviously depends on the position taken in the matter by the appropriate local authorities. [Emphasis added.]

47CFR64.501(e), (1989 edition) section (e) That no recording device shall be used unless it can be physically connected to and disconnected from the telephone line or switched on and off.

95FCC 2d 848- 850\* (1983) and in part reads: (Note that this Memorandum Opinion and Order clarifies that the original and subsequent intent of the rule was that the verbal consent must be recorded. Also note that the clarification's purpose is to affix "the burden of proof on the recording party;" hence, the **need** to include the verbal consent within the recorded communication. Significantly, Delphi Communications Corp. specifically asserts that a "caller who speaks to an answering service ... is effectively on notice that the conversation is being recorded ... [t]herefore ... consent may be inferred, and ... requiring consent to be recorded would be disruptive to the operation of telephone answering systems. In spite of the logic and the request to exempt such systems, the FCC, after weighing such, nonetheless requires that the verbal consent be part of the recording. )

**848\*: ...1. Before the Commission are three petitions for clarification or reconsideration of portions of our Memorandum Opinion and Order in this proceeding, 86 FCC 2d 313 (1981) (Order), ...** [Emphasis added.]

**849\* II. PETITIONS FOR CLARIFICATION OR RECONSIDERATION**

**A. Consent to Record**

5. In its petition for clarification, AT&T poses three requests concerning consent. First, under the supposition that our Order is unclear on the requirement that consent be obtained prior to recording, it asks that we amend the ordering clauses to specify prior consent. Second, **noting that our order does not mandate the manner in which verbal consent is to be obtained, it asks that we require such consent to be recorded.** Lastly, AT&T asks that **we place the burden of proof on the recording party to demonstrate that consent to record has been properly obtained.** [Emphasis added.]

6. AAA and Delphi each partially oppose AT&T's request for clarification. **They argue that the requirement of recording the actual consent would be an unnecessary regulation and that the method of obtaining consent should be left to the recording party.** ... [Emphasis added.]

850\* Delphi believes that the caller who speaks to an answering service, for instance, is effectively on notice that the conversation is being recorded. Therefore, it reasons, consent to record may be inferred, and the burden of requiring consent to be recorded would be disruptive to the operation of telephone answering systems.

7. After carefully considering the above arguments, we will grant AT&T's request in part. **We clearly intended that consent to record be obtained prior to recording a conversation. We will therefore clarify paragraph 23 of the Order to specify that the "all party consent requirement" is satisfied only if the consent is obtained prior to recording the conversation.**<sup>5</sup> **Moreover, while we recognize AAA's and Delphi's concern that the method of obtaining consent remain flexible, we are persuaded that if there is to be any possibility of enforcement, the consent, if verbal, must be recorded.** Thus, if a telephone company's investigation into alleged nonconsensual recording discloses a conflict between the parties to the conversation on the matter of consent, the recording party will have to provide taped or written evidence that consent was obtained. At the same time, of course, as with all tariff prohibitions, the carrier will bear the burden of proving that a violation has occurred before it implements any enforcement procedures. [Emphasis added.]

The result of the FCC's actions and the requirement that a regulated service provider, such as SNET, set out tariffs that comport to the rule as clarified by the FCC's order resulted in a direct link to the language of sSB455 as amended. The SNET Tariff, which is contemporary with and **most likely one of the direct sources of the language for sSB455** in part, reads: (Note that similar language is part of the tariff as that struck by Amendment A, i.e., physically-connected to and disconnected from the telephone line or switched-on and-off.)

#### GENERAL EXCHANGE TARIFF

The Southern  
New England  
Telephone Company

Tariffs Part II  
Section 25  
Sheet 2

Customer-Provided Terminal Equipment

#### 4. Recording of Two-Way Telephone Conversations

Telecommunications services are not represented as adapted to the recording of two-way telephone conversations. However, Customer-provided voice recording equipment may be directly, acoustically or inductively connected with telecommunications services. **When such connections are made, the Customer provided voice recording equipment shall be so arranged that at the will of the user it can be activated or deactivated.** In addition, one of the following conditions must apply: [Emphasis added.]

- All parties to the telephone conversation must give their prior consent to the recording of the conversation, and the prior **consent must be obtained in writing or be part of, and obtained at the start of, the recording;** [Emphasis added.]

- A distinctive recorder tone, repeated at intervals of approximately fifteen seconds, is required to alert all parties when the recording equipment is in use. The distinctive recording tone can be provided as part of (1) the recording equipment, or (2) Customer-provided registered or grandfathered protective circuitry or

- **where such use shall be preceded by verbal notification which is recorded at the beginning, and as part of the call, by the recording party.** [Emphasis added.]

And to address the remote possibility that someone evaluating this example perceives or concludes that a phone's message answering feature was not intended to be considered or included on passage some twenty plus years ago see the legislative history for the House's proceedings on Wednesday, May 9, 1990, page 245 – 246\* (CT State Library data marked **10525** and **10526\***) as follows:

SPEAKER BALDUCCI:

Will you remark further? Representative O'Neill of the 69th.

REP. O'NEILL: (69th)

Thank you, mr. [sic] Speaker. Just very briefly. A question for Representative Mintz. **My understanding of this is that you're talking about tape recording devices. Is that correct? Is that all we're talking about in this bill?** [Emphasis added.]

REP. MINTZ: (140th)

Through you, Mr. Speaker, the bill states no person shall use any instrument, device or equipment to record an oral private telephone communication. If there's anything other than a tape recorder that does that, that would fall under these provisions.

I am not aware of any others, but I'm sure technology is moving along quite rapidly that sooner or later they're going to come up with some instrument besides a tape recorder to do that and this bill is [246\* or 10526\*] trying to take that into account now. [Emphasis added.]

However contemporary phone message answering systems used by **state government offices**, including each elected legislator's office, businesses and homes provide the verbal notification but ordinarily **do not** include it as part of the recording. The result is that it is likely that there are at least 1.5 billion illegal recordings made per calendar year in Connecticut. The proposed bill's subsection (c)(10) eliminates the unintended detrimental consequence.

**Background:** The author of this document has researched the legislative history that was provided by the Connecticut State Library and included: (1) Judiciary Committee proceeding (JUD) – March 17, 1990, (2) Senate proceedings – April 26, 1990, (3) House proceedings – May 9, 1990) sSB455's documented legislative history starts on March 17, 1990 as an excerpt from the Judiciary Committee's proceedings, (4) Raised Bill SB 455 (LNO No. 2608), and (5) Substitute Senate Bill No. 455 (File No. 523) that includes Amendment A, the Fiscal Impact Statement and the OLR Bill Analysis. (For a more complete understanding of the history of the language of SB455 and sSb455 as amended one should peruse the hard copy or the electronic PDF document named 01-52-570d-a-Perspective-from-an-FCC-Tariff-History.pdf within a folder named 04-2012 Modernize-52-570d-Research-Documents, which are on file at the JUD's offices at Rm 2500 of the LOB.) That and other research material revealed that then and in today's communications environment the language codified under P.A. 90-305 resulted in several unintended detrimental consequences that should be rectified as explained and set out below.

From the March 17, 1990 JUD legislative history, the Chief State's Atty. (CSA) is going over the Committee's agenda as it affects that office. When first speaking of SB455, the CSA opens with "... We realize the backdrop under which this proposal is before you." (leg. hist. page 1091) From those words, one must infer that there had been a significant amount of "back and forth" going on among citizen proponents, legislators and the executive that is not on record. This is borne out by a comparison of the original SB 455 – referenced during this public hearing – to the Substitute SB 455, which was voted out of committee at a later date – legislative history not found. The CSA opposes enactment by stating "We just think this bill creates more problems that [sic] it would solve and there would be an awful lot of litigation involved, so we would oppose it." (leg. hist. page 1092)

A fair reading of subsequent portions of the March 17, 1990 legislative history at pages 1199 and 1200 leads one to conclude that crusaders carrying the banner for *individual privacy* as represented by a lobbyist "... testifying on behalf of the American Civil Liberties Union of Connecticut (ACLU/C) for different bills..." will win the day. The spokesperson, a current lobbyist Betty Gallo, states: "**Under present state and federal criminal laws**, at least one part [sic – most likely said "party"] to a telephone conversation must provide consent; otherwise it's not [sic – **to be consistent with statute, the lobbyist should not have said "not."**] a violation of the criminal statutes." [Emphasis added.]

Additionally, the Office of Legislative Research's (OLR) Bill Analysis that is associated sSB455 reads in part "... Current law requires the knowledge of only one party. ... ." However, the OLR analysis does not provide any citation or further reference. And, use of the word "knowledge" within the OLR's Bill Analysis instead of the statute's (See next paragraph.) "consent" could cause a reader to assimilate an incorrect understanding of the substitute SB 455 as amended.

It is most likely that each was referring to sections 53a-187 through 53a-189 (PART XVII\* TAMPERING WITH PRIVATE COMMUNICATIONS, EAVESDROPPING AND VOYEURISM) of the General Statutes of Connecticut. It should be noted that those sections govern the conduct of a "person" who, by the Legislature's language, is **not** a "sender or receiver," (hereinafter referred to as "a non-party-person"), to the communication. A sender or

receiver would have had to have given consent for the non-party-person's action not to have been a criminal offense. See *State of Connecticut v. Charles DeMartin*, 171 Conn. 524, 544 at FN 13 (1976):

The words "wiretapping" and "mechanical overhearing of a conversation" are defined to make it clear that the eavesdropping occurs only when there is an "intentional overhearing or recording of a conversation" **which is carried out "by a person other than a sender or receiver thereof"** and "without the **consent**" of at least one party thereto. General Statutes § 53a-187 (a) (1), (2). **Thus, it is clear that one may tape one's own conversation, whether one is the caller or the one being called.** [Emphasis added.]

**Overview:** The proposed Bill AN ACT MODERNIZING THE RECORDING OF TELEPHONIC COMMUNICATIONS is a reformatted and improved piece of legislation that was developed from the Judiciary Committee's (JUD) 2011 bill SB1149 AN ACT CONCERNING THE RECORDING OF TELEPHONIC COMMUNICATIONS, File No. 730 and the existing language of §52-570d of the General Statutes of Connecticut.

On May 15, 2011 the JUD effected a Joint Favorable Report for SB 1149 on a 42 yea to 0 nay vote (3 being absent). On June 7<sup>th</sup> SB 1149 was brought before the Senate on consent calendar and passed - (Yea 36 and Nay 0) and was transmitted to the House. The following day, June 8<sup>th</sup>, was the last day of the 2011 legislative session and notwithstanding that the bill's content was non-controversial, apolitical, and had no fiscal impact no further action was taken on SB 1149.

The proposed changes to SB1149 and the existing §52-570d retain the "every-other-party" consent requirement, which, in effect, incorporates the General Assembly's original intent – maintaining an individual's **right to privacy** before any recording of a telephonic communication within Connecticut's jurisdiction is permitted, i.e., the existing §52-570d's subsection (a) paragraph (1). The "default" consent requirement set out in the existing §52-570d's subsection (a) paragraphs (2) and (3) where consent is in the form of "implied" or "informed" rather than express consent is also retained.

Two of the existing §52-570d subsection (b)'s exceptions, (6) and (8) were found to obsolete at passage in 1990 and consistent with the "housekeeping" goal, each is proposed to be eliminated. See the PDF document named 86FCC-2d-313-324-Adopt-Every-Other-Party's-Consent at page 321 at footnote 20, which is on file at the JUD's office, Rm 2500 of the LOB.

Additionally, during the 2012 legislative session, the JUD on 4/2/2012 effected a Joint Favorable Report for HB5503 on a 43 yea to 0 nay vote (2 being absent). However, the House took no action to bring HB5503 to a vote before the end of the legislative session.

### **Summary of Substitute Language:**

The set of defined terms that are set out below provide clarity. As an example, the original language used an undefined term, "private telephonic communication," that fosters ambiguity. Was the intent to eliminate business calls or calls made from a public place? Another example, use of the term, "person," would include non-party-persons but a fair reading of the section would lead one to conclude that intent leans toward including only those calling or called, i.e. a party to the telephonic communication.

Provisions that make subsection (b) more efficient and more fair for any party operating under Connecticut's jurisdiction introduce **equal status for all parties** meaning that if a party has gained permission to record, then any party will also have that permission provided that it is also documented.

Proposed language eliminates shortfalls in the existing statute as specified below and makes its operation more reasonable and efficient as it **relates to every party having an equal opportunity to record**.

Proposed language sets out options that would permit a party under Connecticut's jurisdiction to record a telephonic communication that is being conducted with another jurisdiction or set of jurisdictions that operate

under a less stringent consent scheme where the party under Connecticut's jurisdiction may record based on a far end's law – choice of law or conflict of law concept. The language takes into account that if any other party involved is under CT's jurisdiction in that communication, then CT statute applies between and among every party that is under CT's jurisdiction – CT privacy is not diminished in any manner. Proposed language ensures fairness between jurisdictions that operate under an every-party consent scheme, which could be argued as being the jurisdictions of Maryland and Washington only. As an example, Massachusetts (MA) is "considered" an "an all-party" consent state. However, if a party in CT is a party to a communication with a party in MA and the CT party makes a verbal announcement at the beginning of the recording and it is recorded, then, contrary to "common perception," **no consent** is required of the MA party **and** there is no violation of the General Laws of MA. A violation of MA's §§99 B.4. occurs only when the recording is made "**secretly**" from the perspective of the MA law. The subsection's element "**secretly record**" cannot be met provided the announcement can be proven, e.g., the announcement is part of the recording.

#### 99 A. Preamble.

...  
The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, **the secret use of such devices by private individuals must be prohibited.** ... [Emphasis added.]

§§99 B.4. The term "interception" means to ... **secretly record**, ... the contents of any wire ... communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication;

Another example like Massachusetts is California's Penal Code Sec. 632 (a) if (c) is not met. CA's penal code reads:

(a) Every person who, intentionally and without the consent of all parties to a confidential communication, ... records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a ... telephone, ... shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

(c) The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication ... in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. [Emphasis added.]

**The Conventions for understanding the remainder of this document follow:** (Applicable to the proposed language below and patterned after LCO conventions of the 2011 legislative session. For example see SB1149 File No. 730 that is posted on the CGA website at the following URL: <http://www.cga.ct.gov/2011/FC/2011SB-01149-R000730-FC.htm>.)

- (1) The LCO's format is used to present proposed bill.
- (2) The language of the proposed bill has been parsed by subsection to facilitate the insertion of comments that explain in more detail the intent of the proposed changes. Where appropriate, one or more citations and/or authorities have been included as a means to justify the associated language.
- (3) The label "**Rationale**" preceded by a bolded superscript number is used to identify the author's explanation to substantiate and/or enumerate each proposed change and the same superscript number has been appended to the associated proposed language. To set the Rationale's text aside from proposed bill's text, it is set out in a smaller size font and immediately follows the statute's subsection/paragraph/clause as may be the case.
- (4) The label "**Shortfall-(n)**" is used to preface an interpretation of how a part or parts of the existing §52-570d (2011 edition) language operates.



- (5) The phrases "telephonic communication," "oral telephonic communication" and the word "communication/s" as used herein are interchangeable and have the same meaning and intent as the section's original term, "private telephonic communications," which is being deleted and replaced by the defined term "telephonic communication."

Referred to Committee on Judiciary

Introduced by:

(JUD)

### ***AN ACT MODERNIZING THE RECORDING OF TELEPHONIC COMMUNICATIONS.***

Be it enacted by the Senate and House of Representatives in General Assembly convened:

**Section 1.** Section 52-570d of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2012*):

(a) The following definitions are applicable to this section:<sup>1</sup>

(1) "Consent" means any instance of an express, implied or informed agreement, approval or permission that is directly linked to a specific recorded telephonic communication.<sup>1</sup>

(2) "Jurisdiction" means the United States Government, which includes any entity denoted as an authority of or under contract with the United States government, or any one of the several states of the United States.<sup>1</sup>

(3) "Party" means any of the following: any officer, agent or employee of this state or any political subdivision thereof, an employee of or any individual acting in an official capacity on behalf of the United States, and any individual, partnership, association, joint stock company, trust, limited liability company, corporation or other legal entity that was: (A) a caller or a sender, (B) called or a receiver, or (C) a participant, active or otherwise, in any given telephonic communication but does not include a person other than a sender or receiver as set out in 53a-187(a)(1).<sup>1</sup>

(4) "Telephonic communication" means the transfer of the human voice, real or synthesized, in whole or in any part by any means through facilities used for the transmission of communications furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications and where the point of origin is deemed to be and includes the device used by a sender thereof and where the point of reception is deemed to be and includes the device used by a receiver thereof.<sup>1</sup>

(5) "Unlawful" means not specifically authorized by law of this State.<sup>1</sup>

<sup>1</sup> **Rationale:** For (a), self explanatory and the terms of the paragraphs (1) through (5) have been alphabetized.

(1) For the term "consent" the definition makes it clear that any form – express, implied or informed – qualifies to the effect that permission has been/was given for that recording. Example: By giving verbal notification of the intent to record, the verbal notification itself, which is required to be recorded at the beginning of the telephonic communication, (See (b)(2) the proposed bill), implies that the party being recorded consents to the recording by virtue of remaining on the line, i.e., express consent is NOT required because if any party's consent were to be withheld, the party would simply terminate the call.

**consent**, *n.* (14<sup>th</sup> c[entury]) 1. Agreement, approval, or permission ...

**express consent**. (16<sup>th</sup> c[entury]) Consent that is clearly and unmistakably stated.

**Implied consent**. (17<sup>th</sup> c[entury]) 1. Consent inferred from one's conduct rather than from one's direct expression. ...

**Informed consent**. (1938) 1. A person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives.

Black's Law Dictionary Ninth Edition, page 346

(2) For the term "jurisdiction" the definition specifies the body of governing law and intentionally limits the source of the law as opposed to the common definition – "A government's general power to exercise authority over all persons and things within its territory; ... ." Additionally, the term's definition makes it clear that there is a limitation where international jurisdictions and governmental subdivisions of any State are not included.

Black's Law Dictionary Ninth Edition, page 927

(3) For the term "party" and for informational purposes see Gen. Stat. of CT §§1-1(k) and §§54-41a(4).

§§1-1(k) The words "person" and "another" may extend and be applied to communities, companies, corporations, public or private, limited liability companies, societies and associations.

...

§§54-41a (4) "Person" means any officer, agent or employee of the state of Connecticut or any political subdivision thereof, and any individual, partnership, association, joint stock company, trust, limited liability company or corporation;...

Note that the term includes a range of entities that were sourced from other parts of the General Statutes of Connecticut that define the term "person" but the sourced entities would not qualify unless the additional condition is met and that being a person who caused the telephonic communication to come in to being or a person who caused the telephonic communication's circuit to be completed, i.e., a two-way communication. In common terms, that is to say a person is not a party unless the person is the caller or the one being called. And a non-party-person, sometimes referred to as a third-party as in §§53a-187(a)(1), is excluded – see <sup>16</sup> **Rationale's** text below. Simply, the definition improves the original legislative intent for privacy by excluding non-party-persons.

(4) For the term "Telephonic communication" the definition is intended to set the parameters for the General Assembly's original concept of privacy as it applies to use of the telephone system – see Legislative History for JUD, Senate and House proceedings. By sourcing the definition's language from the federal and state same subject law, the proposal focuses on oral while at the same time excluding the set of communications within a category termed "electronic communications" – See 18USC2510(12) – such as fax or digital transfers of financial transactions. The definition also sets the start and end point for the purpose of resolving any potential conflict that could surface through "old" caselaw and precedent. To demonstrate the research that was covered in developing the definition, note the following:

Law:

18USC2510(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception;

NY § 250.00 Eavesdropping; definitions of terms.

The following definitions are applicable to this article:

3. "Telephonic communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of communications and such term includes any electronic storage of such communications.

4. "Aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

8. "Unlawfully" means not specifically authorized pursuant to article seven hundred or seven hundred five of the criminal procedure law for the purposes of this section and sections 250.05, 250.10, 250.15, 250.20, 250.25, 250.30 and 250.35 of this article.

Caselaw: re cordless telephone - conversations are protected telephonic communications. 45 Conn. Supp. 497.

(5) For the term "Unlawful" the intent is to limit the universe of violations that are broadly stated in the existing §52-570d(b)(3), which is the proposed bill's (c)(3) and also the proposed bill's new (e), which was sourced from 18USC2511(2)(d) and other such laws.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such **interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.** [Emphasis added.]

(Note: Because the existing §52-570d's caption or catchline is discussed below, it is being set out here: "Sec. 52-570d. Action for illegal recording of **private**<sup>2</sup> telephonic communications." [Emphasis added.]

(b) [(a)] No [person]<sup>3</sup> party, active or otherwise, in an intrastate telephonic communication<sup>4</sup> shall, [use any instrument, device or equipment to]<sup>5</sup> by any means,<sup>5</sup> record [an oral private<sup>2</sup> telephonic communication unless the use of such instrument, device or equipment (1) is]<sup>5</sup> or cause to be recorded such telephonic communication unless it:<sup>5</sup> (1) Is preceded by documented and reciprocal<sup>6</sup> consent of [all parties to the communication and such]<sup>6</sup> every other party<sup>6</sup> prior [consent either is obtained in writing or is part of, and obtained at]<sup>6</sup> to or as part of the start of [ the] any recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of [the]<sup>7</sup> such telephonic<sup>7</sup> communication [by the recording party]<sup>7</sup> and if any party provides verbal notification, any other party may record provided such verbal notification or another is recorded at the beginning of that party's recording<sup>7</sup>, or (3) is accompanied by an automatic tone warning [device which automatically]<sup>8</sup> that<sup>8</sup> produces a distinct signal that is repeated at intervals of approximately fifteen seconds during [the]<sup>8</sup> such telephonic<sup>8</sup> communication while [such instrument, device or equipment is in use]<sup>8</sup> recording and if any party provides the automatic tone warning, any other party may record.<sup>9</sup>

<sup>2</sup> **Rationale:** By striking the word "private," (that exists in two places as follows: the existing §52-570d's caption or catchline and within subsection (a)'s first sentence that is before subsection (a)'s paragraph (1)), the section is enhanced with more clarity. The original language created ambiguity by using the adjective "private." Is there ambiguity between the term "private telephonic communication" and the term "telephonic communication?" The ambiguity results from the absence of any definition for the term private telephonic communication and the reasonable question as to whether or not a telephonic communication between a business or professional or public servant and someone calling from a home phone would be excluded.

It should also be noted that the existing §52-570d's subsection (b) paragraphs (1) through (8) contain the term **telephonic communication/s** but **DO NOT** contain the term "private telephonic communication/s." Why would

the provisions of subsection (b), which are exceptions or exclusions or exemptions to subsection (a), be crafted in such a manner that are broader than the catchline and language of subsection (a)? Does the section unwittingly become ambiguous because of the discrepancy of the terms?

Without inclusion of a definition in the statute for the term "private telephonic communications," was the original intent to exclude "business" and "public" telephonic communication? How would one determine whether or not any given telephonic communication should be deemed "private" when in fact one party was an "ordinary" party on a home phone and one party was a "salesperson" on a phone at a car dealership or a state legislator?

A review of the legislative history for SB 455 and sSB455 as amended (P.A. 90-305) would, more likely than not, lead one to conclude that the intent of the section was to protect the **privacy rights** of the people of Connecticut rather than to distinguish among the several types or classifications of telephonic communications. As an example, in the Judiciary Committee's hearing, the spokesperson for the ACLU states: "If the principle of individual privacy means anything, it means that all parties to a **telephone conversation**, should have the opportunity to at least consent to a tape recording of that conversation." (Emphasis added. See the legislative history of the Judiciary Committee, March 17, 1990, 112/pat or at page 1200 CT State Library, first full paragraph.) From that statement, it is clear that the spokesperson does not attempt to distinguish one type of telephonic communication from another. (Additional legislative history: Senate proceedings on April 26, 1990 at pages 1413 – 1418; 1441 and House proceedings on May 9, 1990 at pages 10514 – 10536 where the page numbering refers to documents obtained from the CT State Library.)

Additional examples excerpted from the legislative history:

(1) AT 1415 Senator O'Leary speaking: "...I think that what the bill is reaching to is a sense that many of us have that there is a right of privacy. It's not specifically spelled out in the Constitution or in the First 10 Amendments to the Constitution but I think that every American has a feeling that there are certain areas where he is entitled to a degree of privacy and I think the conversation between two individuals falls into that category ..."

(2) AT 10515 SPEAKER BALDUCCI: The question is on passage. Will you remark, Sir?

REP. MINTZ: (140th) [The bill's manager] Yes, thank you, Mr. Speaker. What this bill does is prohibit **any telephone conversation** from being recorded without the knowledge of all parties to the conversation. [Emphasis added.]

(3) AT 10524 REP. RENNIE: (14th) speaking: "Another question to Representative Mintz, ... , what great wrong is it we're trying to correct with this today? ... "

REP. MINTZ: (140th) [The bill's proponent manager speaking] " ... , I believe it is a privacy issue that when **you're a party to a telephone conversation** you should know whether or not that telephone conversation is private, or if it's being recorded. If it's being recorded, you should know, have the opportunity to know that it's being recorded and be able to treat that conversation in a non-private manner." [Emphasis added.]

(3) AT 10533 REP. MINTZ: (140th) [The bill's manager speaking] " ... , the intent of the legislation is to make sure that the conversation remains private.

<sup>3</sup> **Rationale:** By striking the word "person" the original purpose of enacting §52-570d – protecting privacy rights – is enhanced by confining the action of recording to the purview of the parties actually engaged in the telephonic communication thus eliminating an unintended potential for a person other than a party to breach their privacy through modern technological means. Example, an induction-digital transmit device could be surreptitiously placed to intercept telephonic communications. The signal could be received and converted by a software application that included the required automatic tone warning. The result would be a "legal" recording. The proposed language "No party, active or otherwise, in a telephonic communication shall, by any means, record or cause to be recorded that communication..." makes it unlawful for a "person" other than a party to record as set out in the example unless every party gives prior consent.

(Note: As an aside, it is noted here that passage of P.A. 90-305 resulted in CT being "unique" in its subject matter laws when compared to the other state and federal laws. CT's laws are uniquely codified and appear to be uniquely "uncoordinated" with respect to criminal versus civil action. P.A. 90-305 apparently was processed through the legislative system without regard to the criminal law – enacted by 1969's P.A. 828 – in spite of the fact that it seems to have surfaced in the Committee hearing and is referenced by the OLR Bill Analysis of sSB455. Briefly, on the criminal side: (1) A non-party-person is permitted to record a telephonic communication when any party authorizes the recording and (2) because the law does not address the issue, a party may record the telephonic communication at will as verified by caselaw – 171 Conn 524, 544 at FN 13 – whereas on the civil side a party must conform to §52-570d or be subject to a civil action. Examples of "coordinated" subject matter laws: 18USC2510 et seq. and where 26 states follow federal law, California Penal Code, Title 15, Chapter 1.5, Sections 630-638, or Florida Statutes, Title XLVII, Chapter 934, Sections 934.01-934.43.)

<sup>4</sup> **Rationale:** By striking the word "person" and substituting the words "party, active or otherwise, in a telephonic communication" the section would encompass each individual into a grouping rather than operating on each party separately. In other words, before any party is permitted to record or cause it to be recorded the telephonic communication must be viewed as a group event that includes the consent of every recorded party and **not** viewed as a distinct set or sets of parties operating sequentially. Additionally, it should be noted that, to the best of my knowledge, no jurisdiction – U. S. Code, one of the 50 state's law or D.C. law – has defined the term "party" even though the word is included in their statutory language. Therefore, the word's use is governed by the principle of "common every day meaning." And specifically in the General Statutes of Connecticut at Vol. 1, Title 1, Chapter 1, Sec. 1-1(a) and (k) and 1-2z that reads:

**Sec. 1-1. Words and phrases. Construction of statutes.** (a) In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.

...

(k) The words "person" and "another" may extend and be applied to communities, companies, corporations, public or private, limited liability companies, societies and associations.

...

Sec. 1-2z. Plain meaning rule. The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

The only offering is set out in the legislative history for U. S. Congress's Public Law 90-351 that reads: (Cite as: 1968 U.S.C.C.A.N. 2112, 2177 and 2182.)

#### **\*2177 Title III**

Because of the complexity in the area of wiretapping and electronic surveillance, the committee believes that a comprehensive and in-depth analysis of Title III would be appropriate in order to make explicit congressional intent in this area.

#### **\*2182**

Paragraph (2)(c) provides that it shall not be unlawful for a party to any wire or oral communication or a persons [sic] given prior authority by a party to a communication to intercept such communication. It largely reflects existing law. Where one of the parties consents, it is not unlawful. (Lopez v. United States, 83 S.Ct. 1381, 373 U.S. 427 (1963); Rathbun v. United States, 78 S.Ct. 161, 355 U.S. 107 (1957); On Lee v. United States, 72 S.Ct. 967, 343 U.S. 747 (1952)). **Consent may be expressed or implied.** Surveillance devices in banks or apartment houses for institutional or personal protection would be impliedly consented to. Retroactive authorization, however, would not be possible. (Weiss v. United States, 60 S.Ct. 269, 308 U.S. 321 (1939)) and **'party' would mean the person actually participating in the communication.** (United States v. Pasha, 332 F. 193 (7th), certiorari denied, 85 S.Ct. 75, 379 U.S. 839 (1964)). [Emphasis added.]

To assist in the understanding of the proposal please review the definition of the terms:

**party.** (13<sup>th</sup> century) 1. One who takes part in a transaction <a party to the contract> ( Black's Law Dictionary, Ninth Edition, page 1231.) And as an example, also note that US Code 18USC2511(2)(d). Interception and disclosure of wire, oral, or electronic communications prohibited demonstrates that it is more efficient and more

clear to just use "party" rather than "person" because to get where the lawmakers want to go, the section's language reads in part: "...where such person is a party to the communication or where one of the parties to the communication..." It should also be noted that at least 26 states pattern state law on 18USC2511(2)(d) and use the same or similar language. It is a matter of style since the federal legislators chose to define the term "person" under 18USC2510. However, the proposed change herein seeks to eliminate the "non-party-person" as the recorder unless effected under §§53a-187(a)(1) that, in part, reads "(1) **Wiretapping**" means the intentional overhearing or recording of a telephonic or telegraphic communication or a communication made by cellular radio telephone **by a person other than a sender or receiver thereof**, without the consent of either the sender or receiver, by means of any instrument, device or equipment" where the non-party-person must be the one doing the recording. [Emphasis added.] Above, within a proposed addition for a defined set of terms, there is included a defined term "party" that mirrors the defined term "person" as set out in CT §§54-41a(4)..

**person.** (13<sup>th</sup> century) 1. A human being. ... 2. The living body of a human being <contraband found on the smuggler's person>. 3. An entity (such as a corporation) that is recognized by law as having the rights and duties of a human being. Black's Law Dictionary, Ninth Edition, page 1257.

**NOTE:** For Black's Law Dictionary under the Guide to the Dictionary at page xxvi the following is set out: **6. Angle Brackets** Contextual illustrations of a headword are given in angle brackets: ... (See the terms defined above.)

Additionally, as documented above, the existing §52-570d's language **does not** include any definition, which would assist in clarifying legislative intent and reduce the possibility of unintended caselaw because of ambiguity. It should also be noted that the maintenance of the annotations to the General Statutes of Connecticut uncharacteristically did not and does not take full advantage of that technique to improve clarity. The only example is found in Volume 13, Title 53a, Chapter 952, **Sec. 53a-189. Eavesdropping: Class D felony**. The annotation reads: "See Sec. 52-570d re prohibition on recording private telephonic communications and civil remedies for violation thereof." that must be edited when these proposed changes are adopted.

<sup>5</sup> **Rationale:** By striking the words [use any instrument, device or equipment to] and [an oral private<sup>2</sup> telephonic communication unless the use of such instrument, device or equipment (1) is], and substituting the words "by any means, record or cause to be recorded such telephonic communication unless it" the subsection would inherit more clarity in that there is no limiting factor and no list or abstract method to contend with. It was **NOT** the legislators' intent to focus on or limit the scope or details of how the recording was actually done. Refer to the legislative history of the House Proceedings at tcc 245 and tcc 246, which is CT State Library copy at pages 10125 and 10526:

REP. O'NEILL: (69th)

Thank you, mr. [sic] Speaker. Just very briefly. A question for Representative Mintz. My understanding of this is that you're talking about tape recording devices. Is that correct? Is that all we're talking about in this bill?

REP. MINTZ: (140th)

Through you, Mr. Speaker, the bill states no person shall use any instrument, device or equipment to record an oral private telephone communication. If there's anything other than a tape recorder that does that, that would fall under these provisions. I am not aware of any others, but I'm sure technology is moving along quite rapidly that sooner or later they're going to come up with some instrument besides a tape recorder to do that and this bill is trying to take that into account now.

The proposed substitute words "any means" address the manual and technical methods and the words "cause to" addresses which party will be responsible for its being recorded. As an example, the words "any means" would naturally encompass any existing or future technologies as well as stenographic methods and the words "cause to" would naturally encompass anyone acting on the instructions of another, e.g., a hired hand that uses shorthand (as in a court's or legislature's recorder but most likely antiquated in the contemporary environment). As a matter of fact, these issues were addressed at the federal level with the enactment of Public Law 90-351 in 1968. And, Connecticut's companion legislation was the enactment of 1969 P. A. 828 Sec. 189 as amended and 1971 P. A. 68 Sec. 1 as amended. Each set out definitions – see **Sec. 53a-187. Definitions. Applicability.** and **Sec. 54-41a. Definitions.** Both were **before** sSB 455 as amended, which was enacted in 1990.

I also point out that inclusion of "cause to be recorded" is not original or unique in legislative language. See Montana's §§45-8-213(1)(c) that, in part, reads: "**(1)** Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person knowingly or purposely:  
(c) records or **causes to be recorded** a conversation ..." [Emphasis added.]

Because the proposed language clearly speaks of a party, the use of the words "cause to be recorded" provide the direct link to that party. In other words, the substitute text places the responsibility exactly on the party who made the decision to record regardless of the circumstances of how or by whom the actual recording was made. It eliminates any superficial argument, such as; another person in another location initiated the device or when the recording will be set in motion by some as yet unknown technology, etc. Additionally, this set of substitutions produces a singular high order thought by being consistent with the section's caption that reads: "Action for illegal recording..." Redundant use of the root word "record" keeps the intent of the section on point and discourages spurious arguments in an effort to defeat that intent. Why allow focusing on instruments, devices or equipment when the sole intent is to answer the question whether or not the recording of any given telephonic communication, regardless of the means be it by pencil or a computer software application, was illegal or the opposite was it lawful or permitted under the section?

There are a multitude of scenarios or statutory examples that offer evidence that a non-party-person's recording should be taken into account. See legislative history, House of Representatives, May 9, 1990 at tcc 246-247 or CT Library page 10526-10527 reads:

**REP. O'NEILL:** (69th) Well, a second question. There is a device that I would think can effectively record a conversation. It's been in existence for at least 100 years. It's an individual with a pencil and a piece of paper that takes stenography. Would this cover a stenographic transcription of a tape recorder where a third person was on the line at the request of one of the other parties? Through you, Mr. Speaker.

**SPEAKER BALDUCCI:** Representative Mintz.

**REP. MINTZ:** (140th) Through you, Mr. Speaker, I do not believe that's the intent of this bill.

**REP. O'NEILL:** (69th) Well, I guess I would echo Representative Rennie's sentiments. I'm not quite sure what it is we're protecting here. It sounds like we're protecting the sound of somebody's voice from being recorded without their permission and not the content of the conversation, since apparently you can take down the entire conversation, both sides of it, transcribe it, have a court stenographer certify that it's an accurate transcription, have a complete copy of that conversation, all the information contained there, and not violate this provision. So I'm not quite sure what we're trying to achieve here. Thank you, Mr. Speaker.

See 18USC2511(1)(a) and (b) that reads: [Emphasis added.]

**§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited**

(1) Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or **procures any other person to intercept or endeavor to intercept**, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or **procures any other person to use or endeavor to use** any electronic, mechanical, or other device to intercept any oral communication when—

<sup>6</sup> **Rationale:** By striking the sets of words "...[all parties to the communication and such] ..." and "...[consent either is obtained in writing or is part of, and obtained at]..." and the comma and the word ... [, the]... and substituting the set of words "...documented and reciprocal ..." and "... every other party ..." and "... to or as part of..." and "... any ..." in the existing §52-570d's subsection (a) paragraph (1), the paragraph not only inherits clarity the language ensures that there is no **singular sequential event scenario** as adopted from the FCC 47CFR64.501 or the CT Public Utilities Regulatory Authority (PURA) filed tariff by explicitly requiring that every recorded party is in agreement before any party is permitted to record. Additionally, by substituting the words "... every other party ..." for the words "...[all parties ...]" in the set of words "...consent of all parties..." so that the set reads "...consent of every other party..." will unequivocally delineate any recorder from any non-recorder. And, the substitution of "party" for "parties" eliminates the grammatical style of using the plural "parties" because,

in fact, the ratio of two-party calls to three or more party calls is most likely higher than 10 : 1. The words "every other party" apply to any telephonic communication regardless of the number of parties involved.

Compare "old" (a)(1): (1) is preceded by consent of all parties to the communication and such prior [consent either is obtained in writing or is part of, and obtained at the start of, the recording, or

to "new" (b)(1): (1) is preceded by documented and reciprocal consent of every other party prior to or as part of the start of any recording, or

Please review Maryland's §§10-402(c)(3) that reads: (3) It is lawful under this subtitle for a person to intercept a wire... communication where the person is a party to the communication and where all of the [other] parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious ....

To assist in the understanding of the proposal please review the definition of the terms:

**document**, *vb.* (18<sup>th</sup>][century]) [documented, *past tense*] 1. to support with records, instruments, or other evidentiary authorities <document the chain of custody>. 2. to record; to create a written record of <document a file>. >. Black's Law Dictionary, Ninth Edition, page 555.

**record**, *n.* (13<sup>th</sup>][century]) [records, plural] 1. A documentary account of past events, usu. designed to memorialize those events. 2. information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form. UCC § 2A-102(a)(34).

... Black's Law Dictionary, Ninth Edition, page 1387. (Note: As the term "record" supports the term "document.")

**reciprocal**, *adj.* (16<sup>th</sup>][century]) 1. Directed by each toward the other or others; MUTUAL. 2. BILATERAL <a reciprocal contract>. 3. Corresponding; equivalent. Black's Law Dictionary, Ninth Edition, page 1385.

**NOTE:** If one were to peruse the legislative history of the House's proceeding for this section's enactment, one may gain a better understanding why it would be beneficial to "tighten-up" the section's language. Most if not all of the questions during that debate would have been answered or would have been made moot if the proposed text were to have been adopted. (See House of Representatives on Wednesday, May 9, 1990, Page 3, Calendar 533, Substitute for Senate Bill 455, AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS, as amended by Senate Amendment Schedule "A". Favorable Report of the Committee on Judiciary. [pages 10,514 – 10,536.]) A computer .pdf file is available on request.

<sup>7</sup> **Rationale:** By inserting the words "...such telephonic ...," striking the phrase "[... by the recording party ...]" and inserting the words "... and if any party provides verbal notification, any other party may record provided such verbal notification or another is recorded at the beginning of that party's recording ..." in the existing §52-570d's subsection (a) paragraph (2), the paragraph's prescribed method that permits disclosed recording of a telephonic communication would become more efficient in its operation. That is to say eliminate redundant recorded verbal notifications. That is to say, update one's mindset from one party to record to every party to record. Once any verbal notification is given and is part of any given recorded telephonic communication for any given number of parties that record such telephonic communication consent has been given by each recorded party because each recorded party chose to remain on the line. See "implied and informed agreement" at <sup>1</sup> **Rationale** above, i.e., the proposed subsection (a) Definitions (1) consent. The words "...or another is recorded at the beginning of that party's recording ..." were included to cover the scenario such as a conference call where a party joins with the intent to record the telephonic communication say ten minutes after its start and "missed" the opportunity to record the initial verbal notification.

See Washington's §§9.73.030 (3) that reads: (3) **Where consent by all parties is needed** pursuant to this chapter, **consent shall be considered obtained whenever one party has announced to all other parties** engaged in the communication or conversation, in any reasonably effective manner, that such communication or



conversation is about to be recorded or transmitted: **PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.** [Emphasis added.]

<sup>8</sup> **Rationale:** By striking the words "... [device which automatically] ...," which are redundant to the existing preceding words "automatic tone warning," inserting the word "...that ...," in the existing §52-570d's subsection (a) paragraph (3), the paragraph would contain more clarity. Substituting the word "that" for the set of struck words "...[device which automatically] ..." simply connects the language that remains so that it is a coherent thought. Note that by striking the set of words "... [device which automatically] ...", the paragraph, which was written some twenty years ago for Connecticut law and most likely some forty plus years ago for the FCC regulation, gets updated into the present where it is more likely than not that any automatic tone warning produced today is done by software in a digital environment as opposed to a mechanical or electrical device.

<sup>9</sup> **Rationale:** By inserting the words "... and if any party provides the automatic tone warning, any other party may record." in the existing §52-570d's subsection (a) paragraph (3) each party would be on an even footing where any party may record. That is to say, **the fairness concept** is set out and the language of the paragraph becomes an efficient and effective procedure. Acceptance of this proposal would improve the statute's intent considerably.

I repeat - each elected official of the Connecticut State Legislature should avail themselves of this opportunity to provide their constituents with an increased measure of fairness and a set of efficient procedures for recording telephonic communications **while at the same time preserving and protecting their right to privacy.**

<sup>2</sup> **Shortfall-(1):** The existing §52-570d's subsection (a) in conjunction with paragraph (1) operates within a two or multiple party Connecticut intrastate telephonic communication in such a manner that puts the first party that agrees to the other's recording at a distinct disadvantage. The language, as it exists, operates in a **singular sequential event scenario**. Take the case where a telephonic communication begins between parties who are acting pursuant to Connecticut's jurisdiction and where **both** intend to record the communication. Party A asks Party B to agree to the recording and obtains an affirmative response. The paragraph's operation then requires that Party B obtain an affirmative response. If Party A denies Party B's request, then according to the operation of subsection (a) paragraph (1) and what has transpired, Party A is permitted to record whereas Party B is not and would be subject to the penalties of the existing language of subsection (c) if the recording were to be made. Exclusive of Party B terminating the telephonic communication, this shortfall can be mitigated by eliminating the **singular sequential event scenario** and substituting an all or none group consent concept, which would incorporate that each party be fair to and respectful of one another. The group consent concept deters mischief where one party obtains consent while denying it to any other.

Further, there is definitive documented evidence that justifies the conclusion that the language was intended to operate as a **singular sequential event scenario**. Although one cannot offer definitive proof because of the paucity of the legislative history, one can present a reasonable evidentiary trail as follows:

**Step 1.** Introduction of the "bare bones" original SB 455 as obtained from Connecticut State Library and it reads:

STATE OF CONNECTICUT  
 Raised Rill No. 455  
 Referred to Committee on JUDICIARY  
 Introduced by (JUD)

Page 1 of 2

LCO No. 2608

General Assembly  
 February Session, A.D., 1990

AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

(NEW) (a) No person shall record a private telephonic communication by means of any instrument, device or equipment without the prior consent of all participants in such communication.

[NOTES: 1. It is significant to fix the event by date: "February Session, A.D., 1990." 2. Line numbers and extraneous markings have been deleted for brevity sake. 3. An Acrobat pdf file of the original material is available upon request. 4. Subsections (b) and (c) are not germane to the **singular sequential event scenario**. 5. Because SB455 serves only to fix a starting time frame, this analysis ignores the fact, whether intentional or not, that the language literally operates in a manner where the one that actually does the recording must be one who is not a party to the telephonic communication.]

Step 2. Perform an examination of the legislative history. Specifically, clues derived from testimony: Judiciary Committee – March 17, 1990:

1. Repeated from the **Preface** section above as spoken by Chief State's Atty.: "... We realize the backdrop under which this proposal is before you." (leg. hist. page 1091)
2. Spoken by lobbyist on behalf of ACLU/C: "**The Federal Communication Commission does have a tariff requirement on telephone companies** which provides that both parties to a telephone conversation much [sic – most likely should read "must"] consent. However, this requirement is seldom voiced by the telephone company and does not carry significant sanctions." [Emphasis added.]

[NOTES: 1. It is significant to fix the event by date: March 17, 1990, which is **after** the first iteration of SB 455 – February Session, A.D., 1990 – that is a bill is raised before the public hearing is held. 2. Why does the Chief State's Atty. mention "backdrop?" What was going on? 3. Why does the lobbyist mention "The Federal Communication Commission [and] telephone companies?" 5. An Acrobat pdf file of the original material is available upon request.]

Step 3. Introduction of the "Substitute" SB 455 as amended by Schedule A as obtained from Connecticut State Library and it reads:

File No. 523

Substitute Senate Bill No. 455

Senate, April 18, 1990. The Committee on Judiciary reported through SEN. AVALLONE, 11<sup>th</sup> DIST., Chairman of the Committee on the part of the Senate, that the substitute bill ought to pass.

#### AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

(NEW) (a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless: ~~(1) Such instrument, device or equipment can be physically connected to and disconnected from the telephone line or switched on and off; and (2) the use of such instrument, device or equipment~~ (A) (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (B) (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (C) (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use.

[NOTES: 1. It is significant to fix the event by date: April 18, 1990, which is **after** the documents in Steps 1 and 2. 2. Line numbers and extraneous markings have been deleted for brevity sake. 3. The strikethroughs represent hand made changes to the "Substitute" and is the referenced amendment Schedule A, LCO 4114. See legislative history of Senate proceedings **April 26, 1990** at pages 1413 and 1414. 4. Subsections (b) and (c) are not germane to the **singular sequential event scenario**. 5. An Acrobat pdf file of the original material is available upon request. 6. Compare the "original" SB 455 to the "Substitute as amended, which was developed in the "backdrop" environment. The Substitute introduces efficiency and fairness in that it sets out options and choices. 7. Link the FCC – "telephone company" comment to the language of the "Substitute" and the result is Step 4 next.]

Step 4. The lobbyist's comment regarding **FCC tariff** prompted research into the FCC's regulation (Title 47 Telecommunications) on the subject of recording calls. That research revealed what is most likely one of the sources of the existing language of subsection (a) paragraphs (1), (2), and (3) of Substitute SB 455 and as a

reinforcement even that portion that was struck under the Amendment Schedule A is present. The source is HeinOnline 1989 edition of 47CFR64.501 in relevant parts reads: [Emphasis added.]

**§ 64.501 Recording of telephone conversations with telephone companies.**

No telephone common carrier, subject in whole or in part to the Communications Act of 1934, as amended, may use any recording device in connection with any interstate or foreign telephone conversation between any member of the public, on the one hand, and any officer, agent or other person acting for or employed by any such telephone common carrier, on the other hand, except under the following conditions:

(a) Where such use shall be preceded by verbal or written consent of all parties to the telephone conversation, or

(b) Where such use shall be preceded by verbal notification which is recorded at the beginning, and as part of the call, by the recording party, or

(c) Where such use shall be accompanied by an automatic tone warning device, which will automatically produce a distinct signal that is repeated at regular intervals during the course of the telephone conversation when the recording device is in use.

\*\*\*

(e) That no recording device shall be used unless it can be physically connected to and disconnected from the telephone line or switched on and off.

[NOTES: 1. It is significant to fix the date of the regulation, which is **before** any of the events that transpired as outlined in Steps 1-3. 2. An Acrobat pdf file of the original material is available upon request. 3. Emphasis was added to the regulation's text].

**Conclusions:** A fair reading of the regulation must lead one to conclude that the FCC's intent was to fix a **singular sequential event scenario**. It is made clear that there was **one recorder**, the "telephone common carrier." It is clear that the regulation does not anticipate the "member of the public" to make any recording and in fact does not even address the issue. (See 6FCC 2d 587 (1967) and 9FCC 2d 11 (1967).) The proof of the existence of the **singular sequential event scenario** is not debatable and that **singular sequential event scenario** language was unwittingly or not transferred into Substitute SB 455 as amended, which is the existing subsection (a) paragraph (1) of section 52-570d of the General Statutes of Connecticut. **The shortfall is there and should be corrected so that the section ensures that every recorded party consents before any party is permitted to record AND; if one party has obtained consent, then every other party is deemed to have received consent because the consent must be "documented and reciprocal" as set out in the proposed change to the existing paragraph (1) of subsection (a) of section 52-570d. Be fair and be efficient, incorporate the proposed changes to paragraph (1) to effect a reasonable resolution.**

**Shortfall-(2):** It is reasonable to make the assumption that most of the language of the existing §52-570d's subsection (a) was copied from 47CFR64.501 1989 edition or from the tariff language that was/is on file with the Connecticut PURA formerly the Department of Public Utility Control or both. Shortfall-(1): above presents evidence to substantiate that the language of the existing subsection (a) paragraph (1) operates in a **singular sequential event scenario**, which is based on the FCC's understanding that there would be one recorder, the "telephone common carrier." By assimilating that language, the Connecticut Lawmakers carried forward that operation. As a result, a fair reading of the existing §52-570d's subsection (a) paragraph (2) must lead one to conclude that if there is more than one recorder to any given telephonic communication – say from two to five, then there must be an equal number of recorded **"verbal notifications,"** which are required by the inclusion of the phrase **"by the recording party."** Why be so inefficient? Why be so redundant? By virtue of any party staying on the line once any verbal notification is provided it must be a given that said party consents, i.e., every recorded party consent pursuant to an implied or informed consent. And, if every recorded party has consented, why not let anyone record provided the verbal notification is part of that recording? Let one notification stand for any number of notifications per recorded call. If one places a call and knows in advance that the receiving point will generate the verbal notification, why is there a need for two or more? One would merely record the far end's verbal notification and that would be fair, efficient, and the end of it.

Additionally, compare the existing §52-570d's subsection (a)(2) to (a)(3). The language of (a)(3) **does not** include the phrase "by the recording party." What is the conceptual difference between a verbal notification and an automatic tone warning? The answer is **none**. Both serve the intended function – conveying knowledge that the communication is being recorded. If one were to demonstrate to lawmakers what a recording would sound like with say five tone warnings at the same time, in or out of sync, it is most likely that the lawmakers would ensure that the phrase "**by the recording party**" was not included in a law's language. If requiring multiple tone warnings within one telephonic communication is not reasonable, why are multiple verbal notifications reasonable?

By way of example, Washington state legislators set out language that implements efficiency.

RCW Sections RCW 9.73.030 Intercepting, recording, or divulging private communication — Consent required — Exceptions.

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device **between two or more individuals between points within or without the state by any device electronic or otherwise designed to record** and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication; [Emphasis added.]

...

(3) **Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.** [Emphasis added.]

Please remember that the FCC crafted the language specifically knowing that there was only **one recorder**, the "telephone company[]."

(c)<sup>10</sup> [(b)]<sup>10</sup> Unless otherwise specified, t[T]<sup>10</sup>he provisions of subsection [(a)]<sup>10</sup> (b)<sup>10</sup> of this section shall not apply to:

(1) Any federal, state or local criminal law enforcement official who in the [lawful]<sup>11</sup> performance of his duties records telephonic communications;

(2) Any officer, employee or agent of a public or private safety agency, as defined in section 28-25, who in the [lawful]<sup>11</sup> performance of his duties records telephonic communications of an emergency nature;

(3) Any p[erson]arty<sup>12</sup> who, as the recipient of a telephonic communication which conveys threats of extortion, bodily harm or other unlawful requests or demands, records such telephonic communication;

(4) Any p[erson]arty<sup>12</sup> who, as the recipient of a telephonic communication which occurs repeatedly or at an extremely inconvenient hour, records such telephonic communication;

(5) Any officer, employee or agent of any communication common carrier who in the [lawful]<sup>11</sup> performance of his duties records telephonic communications or provides facilities to an investigative officer or criminal law enforcement official authorized pursuant to chapter 959a to intercept a wire communication;

[(6) Any officer, employee or agent of a Federal Communications Commission licensed broadcast station who records a telephonic communication solely for broadcast over the air;]<sup>13</sup>

(6) (7) Any officer, employee or agent of the United States Secret Service who records telephonic communications which concern the safety and security of the President of the United States, members of his immediate family or the White House and its grounds; [and]

[(8) Any officer, employee or agent of a Federal Communications Commission broadcast licensee who records a telephonic communication as part of a broadcast network or cooperative programming effort solely for broadcast over the air by a licensed broadcast station.]<sup>13</sup>

(7) Any party who records a telephonic communication, provided:

(A) Such party under this state's jurisdiction has complied with subsection (b) of this section and, every other party is operating under the authority of or under contract with the United States regardless of location, or

(B) Such party under this state's jurisdiction has complied with subsection (b) of this section and had given consideration to laws, if any, that apply within any given termination point's jurisdiction and every other party is not under this state's jurisdiction;<sup>14</sup>

(8) Any party who records a telephonic communication provided the intent of the recording is to memorialize evidence of a crime before, during or after the fact and the unaltered and undisclosed recording must be submitted to law enforcement within a reasonable amount of time;<sup>15</sup>

(9) Any party who, by consent, caused and the person who recorded such telephonic communication pursuant to 53a-187(a)(1); and<sup>16</sup>

(10) Any recording that results from any automatic or automated system that may be reasonably categorized as a voice mail, call center, phone answering or similar system and where the calling party was acting under informed consent in such telephonic communication.<sup>17</sup>

<sup>10</sup> **Rationale:** Strike [(b)] and insert (c) and strike [(a)] and insert (b) because the existing §52-570d's subsection (a) by this proposal will be redesignated as (b). The words "Unless otherwise specified ..." are required because subparagraphs (A) and (B) of the proposed paragraph (7) contain language that does not make an exception when any given three-or-more-way telephonic communication includes at least two intrastate parties, e.g. a conference call that includes x number of intrastate and y number of interstate end points and where x equals 2 or more. Replacing the capital "[T]" with a small "t" is a technical change.

<sup>11</sup> **Rationale:** I would strongly encourage that the word "lawful" in the existing §52-570d's subsection (b)(1), (2), and (5) be struck to eliminate the oxymoron where "performance of his duties" would of necessity preclude having unlawful duties to perform. (Note: Said suggested changes were effected in the 2011 legislative session in SB1149 and evaluated by the OLR's Bill Analysis section that in part reads: "... (The bill removes the term "lawful" which has no legal effect since the performance of their duties is presumed to be lawful), ... ."

<sup>12</sup> **Rationale:** Strike the letter combination "erson" that is immediately preceded by the letter "p" within paragraphs (3) and (4) and below in the existing §52-570d's subsection [(c)] that is being designated as (f). Then insert the letter combination "arty" so that each reads "party" in lieu of reading "person." The purpose is to make the language consistent with the proposed subsection (a)'s definition for the term "party." And overall increase the goal of privacy by unambiguously eliminating any non-party-person from recording any telephonic communication unless authorized under §§53a-187(a)(1).

<sup>13</sup> **Rationale:** The existing §§52-570d(b)(6) and (8) are being deleted based on research that revealed that each was obsolete when they were incorporated into sSB455. Notably, the source language SNET's Tariff in part reads: (Note: SNET through an administrative or clerical error failed to keep current their tariffs as required by FCC order – see below.)

The Southern New England Telephone Company  ...	GENERAL EXCHANGE TARIFF	Tariffs Part II Section 25 Sheet 2  Customer-Provided Terminal Equipment
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a. The FCC has established the following exceptions to the foregoing requirements:

(1) When used by a Federal Communications Commission licensed broadcast station Customer for recording of two-way telephone conversations solely for broadcast over the air.

...

(3) When used by a broadcast network or by a cooperative programming effort composed exclusively of Federal Communications Commission broadcast licensees to record two-way telephone conversations solely for broadcast over the air by a licensed broadcast station.

However, in an FCC Memorandum Opinion and Order predating the 1987 SNET tariff, which in turn predated sSB455, the FCC by other actions made the "broadcast exceptions" obsolete. See 86FCC 2d 313, 321 and 322 (Adopted: May 7, 1981) that in part reads:

#### C. Exceptions to the Revised Tariff Provision

19. We have decided to allow three exceptions to the revised tariff requirement which will supersede the five current exceptions.<sup>20</sup>

...

<sup>20</sup> The present exceptions for the Secret Service, Department of Defense, and the Nuclear Regulatory Commission are included in the new exceptions noted below. **Broadcasters and broadcast organizations will not require an exception under the revised policy (see e.g. 38 FCC 2d 579 (1972) and *Broadcast of Telephone Conversation*, Docket 18601, 23 FCC 2d 1 (1970)) since they are required to obtain prior consent before a conversation can be recorded for broadcast. See e.g., 47 C.F.R §73.1206. Moreover, since Section 73.1206 excepts from the prior-consent rule for broadcasters, conversations where the caller is aware, or is presumed to be aware, that the call, is likely to be broadcast, we will construe that prior consent for recording these calls has been given for purposes of the tariff requirement. [Emphasis added.]**

<sup>14</sup> **Rationale:** The purpose of the (new) paragraph (7) is to permit any party under Connecticut's jurisdiction to lawfully record any telephonic communication being conducted: (Note: PROVIDED that if any additional party is intrastate, the recording CT party must also comply with subsection (b).)

a. with the U. S. Government, actual or contracted, including any U. S. Government entity physically within or without of Connecticut's jurisdiction. The premise is to bestow the U. S. Code's Congressional consent on a party within Connecticut's jurisdiction, which is enumerated in 18USC2511(2)(d) that in part reads:

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a [telephonic] communication where such person is a party to the communication ... .

This is also a facet of the fairness concept. If the federal party is permitted to record under Congress's legislatively bestowed consent, then it would only be fair that any other party be permitted to record under the same standard of a Connecticut General Assembly's bestowed consent. **Additionally, this provision promotes transparency in government.**

b. where the point of origin/reception is outside of Connecticut and that the party under Connecticut's jurisdiction has completed due diligence with regard to the laws that affect recording of a telephonic

communication within any jurisdiction outside of Connecticut's jurisdiction. The intent is to put any party under Connecticut's jurisdiction on an **equal footing** with any party who is permitted to record and is not under Connecticut's jurisdiction or when the party under Connecticut's jurisdiction has defended against any specific element of another jurisdiction's law that would otherwise preclude recording the communication. The most significant illustration of the **fairness – equal footing** concept pertains to the set of legislatively bestowed consent jurisdictions, i.e., at least 26 states, US Code and DC Code. By virtue of being silent or incorporating the legislatively bestowed party consent requirement into each jurisdiction's laws or caselaw, it is clear that each legislature has given due diligence to the degree in which privacy is to be expected when any party so chooses to communicate via telephonic communication. **Simply put, there is no invasion of a party's right to privacy when in law and in fact, none is legislated nor expected.**

By adopting clause (B) Connecticut's statute would be unique and preeminent in that it (a) provides guidance to any party acting under Connecticut's jurisdiction of their social and legal obligation to be respectful of and responsible for having knowledge of privacy rights in other jurisdictions; and, (b) recognizes that parties under Connecticut's jurisdiction have an obligation to respect the relevant laws in other jurisdictions. Most likely, any officer of any court would point to Connecticut statute as being a fair and comprehensive model for any jurisdiction considering legislation with regard to recording of telephonic communication. The proposed language will mitigate the potential for "conflict of law" or "choice of law" litigation.

As a general rule, calls that cross state lines become complicated legal issues especially when one state is a legislatively bestowed consent state and the other state is what is commonly but most likely incorrectly called an "all-party" consent state. What may happen is that one didn't violate the law in the legislatively bestowed consent state and violated the law in the "all-party" consent state. This proposal intends to be pro-active with regard to "conflict of law" and/or "choice of law" issues. Caselaw seems to be unsettled however; there is at least one case of significance (KELLY KEARNEY et al., v. SOLOMON BROTHERS BARNEY, INC. cited 137 P3d 314 or 39 Cal. 4<sup>th</sup> 95.) An Adobe .pdf file is available on request. See also 47 DePaul Law Review 827-942 (1998) What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping authored by C. M. Cast. See *Jeffrey Lord v. Patricia Lord*, 33 Conn. L. RPTR. No. 3. 88 (November 4. 2002)

Adoption of this proposed paragraph would make clear to any officer of a court that parties under Connecticut's jurisdiction are directed to be lawful when recording across a state line when any party in that state is operating under a legislatively bestowed consent statute or "all party" consent statute provided the due diligence requirement has been met.

Additionally, if any party outside of Connecticut's jurisdiction is operating under an "all-party" consent law, intends to record, and is complying with that law, then the Connecticut party must be canvassed for consent before the communication can legally continue. At that point, the Connecticut party can get reciprocal consent and record.

<sup>15</sup> **Rationale:** Self explanatory. But take into account that the existing section's language includes lesser offences (See (b)(3) and (4).) so it is only reasonable to include offences of a higher degree.

The CT General Assembly did not adequately perform its responsibility of "due diligence" when it developed the language used in final passage of sSB455 AN ACT CONCERNING THE RECORDING OF TELEPHONE CONVERSATIONS and signed into law by P.A. 90-305. As an example, consider the following:

In 1967 the CT General Assembly passed legislation that was signed into law as (a) P.A. 828, Sec. 189 and codified as §53a-187. Definitions. Applicability. where §§ (a) in part reads: "(1) "Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication or a communication made by cellular radio telephone by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment." [Emphasis added]  
In 1967 the CT General Assembly passed "related" legislation that was signed into law as (a) P.A. 871 where it reinforced a person's right from unreasonable search and seizure as follows:

Sec. 52-184a. Evidence obtained illegally by electronic device inadmissible. No evidence obtained illegally by the use of any electronic device is admissible in any court of this state.

(1967, P.A. 871.)

See Sec. 53a-187 et seq re tampering with private communications and eavesdropping.

Cited. 211 C. 555. Cited. 15 CA 529. Cited. 39 CS 392.

The facts here are that (1) under §§53a-187(a) a "party" to a telephonic communications, at will, may record that telephonic communication – no consent is required from any other party. (See *State of Connecticut v. Charles DeMartin*, 171 Conn 524, 544 at FN 13 (1976)) and (2) any recording made by a party that memorialized evidence of a crime was admissible in any CT court of law.

When the CT General Assembly passed sSB455 in 1990 without including an exception whereby a party would be permitted to memorialize evidence of a crime by an undisclosed recording, the legislators failed to maintain the integrity of the goals of the statutes as a whole. Instead, the legislators focused on less significant offenses by including exceptions as follows:

(3) Any person who, as the recipient of a telephonic communication which conveys threats of extortion, bodily harm or other unlawful requests or demands, records such telephonic communication;

(4) Any person who, as the recipient of a telephonic communication which occurs repeatedly or at an extremely inconvenient hour, records such telephonic communication;

By the opening statement – "The CT General Assembly did not adequately perform its responsibility of "due diligence" when it developed the language used in final passage of sSB455 ... and signed into law by P.A. 90-305." – I refer to the fact that preceding the vote on sSB455 there was an exchange between the manager of the bill and another representative where it was made known and agreed to that the language of sSB455 would be detrimental to the State's Attorney's Office. In spite of that colloquy, the House took no action to offer any amendment that would eliminate the unintended detrimental consequence. See the legislative record for the House session dated Wednesday, May 9, 1990, 239 through 241 that reads:

[239] Representative Farr.

REP. FARR: (19th)

Just one other question, one concern I have on this. Somebody calls me, I realize that there are certain things that are excluded. Those are basically threat type of conversations. Somebody calls me and says, offers, for example to bribe me, to buy my vote in the Legislature, and I tape record that. Is that excluded from this, through you, Mr. Speaker, to Representative Mintz.

SPEAKER BALDUCCI:

Representative Farr. Excuse me, Representative Mintz.

REP. MINTZ: (140th)

Through you, Mr. Speaker, if the bill states for blackmail calls, that would be excluded. The purchase of a vote I'm not quite sure falls under that kind of provision, so it might be excluded in this.

REP. FARR: (19th)

Well, through you, Mr. Speaker, to Representative Mintz, I'm not talking about blackmail. If somebody calls me up in my office and says, there's an important vote coming up, I'd like to offer you \$10,000 to change your vote, as I read the bill, if I recorded that conversation, went to somebody suggested, take the [240] money, and I went to the State's attorney's office and said I have a tape recording, somebody called me offered me \$10,000, this is a recording. They listen to the recording and then they arrest me. Isn't that the way the bill works, because I illegally recorded that telephone conversation. Through you, Mr. Speaker, to Representative Mintz .

REP. MINTZ: (140th)

Through you, Mr. Speaker, I don't believe that you'll be arrested for that. I think the only penalty under this is, they may bring a civil rights action against you, the person who you recorded the telephone conversation.

REP. FARR: (19th)

There are no criminal penalties whatsoever in this bill?

REP. MINTZ: (140th)

Through you, Mr. Speaker, none that I see.



REP. FARR: (19th)

Would that tape recording then be illegal for purposes of admission in a criminal proceeding? Through you, Mr. Speaker, to Representative Mintz.

SPEAKER BALDUCCI:

Representative Mintz.

REP. MINTZ: (140th)

[241] Through you, Mr. Speaker, I believe that that tape recording probably would be suppressible in a criminal case. [Emphasis added]

REP. FARR: (19th)

Well, I'd just suggest to the Chamber that if that's the case, this may be a serious problem here. We're not talking about somebody, law enforcement officials going out and doing illegal tapes. I mean, somebody calls me on my phone and I happen to have the answering machine there, I leave it on because they're making what I think to be an illegal offer. We pass the bill. Apparently that doesn't, now is suppressible. I'm not sure I like the bill. Thank you.

There is on record a very tragic instance where "evidence" in the form of a recording related to one's own murder was suppressed because there was no consent given for the recording – see *People v. Otto* (1992) 2 Cal. 4th 1088 [831 P.2d 1178, 9 Cal. Rptr. 2d 596]. (See CT's Sec. 52-184a.) Most jurisdictions include such a provision and Connecticut should join. See 18USC2511(2)(d) that in part reads: (Note: 26 state jurisdictions have adopted the federal language.)

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a [telephonic communication ... **unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.** [Emphasis added.]

During the 2011 legislative session, the Judiciary Committee set out (Raised) HB6367 AN ACT CONCERNING THE FAILURE OF A WITNESS TO REPORT A SERIOUS CRIME, which, if resurrected and enacted, would operate more efficiently if this proposed change were to be enacted.

<sup>16</sup> **Rationale:** The proposed paragraph (c)(9) seeks to reconcile sections of the statutes and specifically effect a reasonable compatibility between CT's §§53a-187(a)(1) "Wiretapping" of the Penal Code and the existing §52-570d of the Civil Actions. §§53a-187(a)(1) permits a party to a telephonic communication to authorize a "non-party-person" to record it but §52-570d makes that party subject to a civil action. See <sup>1</sup> Rationale (3)'s text above. Simply, no common sense exists when the state condones one's behavior in one part of CT Statute and then condemns that same behavior in another part.

Unfortunately, when SB455 was going through the legislative process – during the public hearing – it appears that no one identified the inherent unintended detrimental consequence. See the legislative history for the JUD public hearing March 17, 1990 at pages 1199 and 1200 a lobbyist Betty Gallo, states: "**Under present state ... criminal laws, at least one part** [sic – most likely said "party"] **to a telephone conversation must provide consent**; otherwise it's not [sic – to be consistent with statute, the lobbyist should not have said "not."] a violation of the criminal statutes." [Emphasis added.]

<sup>17</sup> **Rationale:** Adoption of this proposed paragraph (c)(10) would make it clear that any recorded message that resulted from an automatic/automated answering system such as one inherent in many existing telephone models or from a common carrier's voice mail service or a business's directed voice box program would be exempt/excluded. This paragraph is included because automatic/automated answering systems generally **DO NOT** include the announcement as part of the recording as required under the existing subsection (a) paragraph (2) of section 52-570d and carried forward as modified by the proposed (b)(2). This paragraph is consistent with the proposed subsection (a)(1), Definitions, where "consent" includes the variations, implied and informed. That is to say when a message is recorded, the calling party's conduct is carried out with full knowledge that a recording will result. This paragraph falls under the concept of efficiency as outlined in the Preface section above. Technological features associated with contemporary telephones have made digital answering systems ubiquitous. It is most likely that each legislator's good office/s employs such technology and yet, under the

existing section 52-570d of the Gen. Stat. of Connecticut, its use and resulting recording is most likely illegal because its operation does not incorporate its verbal notification as "part of the communication by the recording party." That is to say the **"use of such instrument, device or equipment is [not] preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party."** See the existing subsection (a) paragraph (2) of section 52-570d.

(d) Where consent by every recorded party is required for any given telephonic communication regardless of jurisdiction, consent from every recorded party shall be considered obtained when any recording party has given verbal notification and such verbal notification is recorded at the beginning and is part of such telephonic communication or another verbal notification is recorded at the beginning of that party's recording during such telephonic communication.<sup>18</sup>

<sup>18</sup> **Rationale:** Inclusion of this subsection makes it clear that consent is deemed to have been given when any party elects to remain a party to the telephonic communication. Any party who decides to withhold consent is obligated to terminate the telephonic communication. The main purpose for this subsection is to make it clear that Connecticut's law has standing when there is a conflict of law situation. Jurisdictions such as Maryland do not define consent as being inclusive of the variants, implied or informed. Should conflict of law become a factor in any given proceeding, this subsection's language will support the party that operated under Connecticut's jurisdiction.

Generally, the concept for this language was derived from another state's law. See the Revised Code of Washington Chapter 9.73 Privacy, violating right of that in part reads:

9.73.030 ... (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals **between points within or without the state** by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of **all the participants** in the communication;

...

(3) **Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.** [Emphasis added.]

(e) Notwithstanding subsections (b) and (c) of this section, it shall be unlawful for any party to a telephonic communication to record such telephonic communication if such recording is for the purpose of committing any criminal or tortious act.<sup>19</sup>

<sup>19</sup> **Rationale:** Self explanatory. The language is patterned after the U. S. Code (18USC §2511(2)(d)) and other states' statute(s) that were reviewed.

(f) [(c)]<sup>12</sup> Any p[erson]arty<sup>12</sup> aggrieved by a violation of [subsection (a) of]<sup>20</sup> this section may bring a civil action in the Superior Court to recover damages, together with costs and a reasonable attorney's fee.

<sup>20</sup> **Rationale:** The existing subsection (c) is designated as subsection (f) because the subsections above have been reformatted, edited, redesignated or are new. The words [subsection (a) of] would be deleted to provide a penalty for any violation of the section's provisions.